

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an application made under and in terms of section 9E (1) of the Muslim Mosques and Charitable Trusts or Wakfs Act No.51 of 1956 as amended.

**Court of Appeal Case No:
CA/LTA/06/2022**

**Wakfs Tribunal Case No:
WT/268/1019**

1. Mohamed Ibrahim Mohammed Mafaz
No. 40/10, King Lane,
Pannawa,
Kobeigane.
2. Mohammed Jabir Mohammed Maznavi
No.51/1, Beira Road,
Colombo 12.
3. Pakeerdeen Sahib
No.427/D, Kanamoolai,
Madurankuliya.
4. Abdul Raseedu Muhammadu Manas
No.22, Western Solden Road,
Puttalam.
5. Mohammed Mohamed Ashraf
No.32, Temple Avenue,
Maradana,
Colombo 10.

PLAINTIFFS

-Vs-

1. Mohamed Alavi Nawaz Gafoor
No.57, Green Path,
Colombo 07.

2. Majid Abdul Carder
No.85, Barnes Place,
Colombo 07.

3. Mohamed Riyaz Mohamed Hamza
No.11, Ruhunukala Mawatha,
Colombo 08.

And Presently
Puisne Judge – High Court of Fiji.
Registrar of the High Court of Fiji,
Fiji.

4. Ahmed Jazeem Mohamed Arif
No.171/7A, Bauddhaloka Mawatha,
Colombo 04.

5. Mohamed Zubair Nehru Caffoor
No.10/16A, Lake Drive,
Lake Drive Enclave,
Colombo 08.

6. Mohamed Iqbal Faiz Abdul Caffoor
No.31, W.A.D. Ramanayake
Mawatha,
Colombo 02.

7. Farzad Hussain Caffoor
No.05, Flower Road,
Colombo 07.

8. Azmeth Hussain Caffoor
No.114B, Horton Place,
Colombo 07.

9. Mohamed Thalib Hussain Caffoor
No.81, Horton Place,
Colombo 07.

10. Mohamed Uvais Mohamed Hamza
No.26/9, Sir Marcus Fernando
Mawatha,
Colombo 07.

Trustees of the Trust established by
the Deed/indenture of Trust bearing
No.2125 dated 1935.11.21 attested by
John Wilson of Colombo Notary
Public.

DEFENDANTS

AND NOW BETWEEN

In the matter of an application for Leave
to Appeal under and in terms of section
754 (2) read with section 757 of the Civil
Procedure Code and section 55A of the
Muslim Mosques and Charitable Trusts or
Wakfs Act, No.51 of 1956 as amended
against the Order of the Wakfs Tribunal
dated 03.09.2022

1. Majid Abdul Carder
No.85, Barnes Place,
Colombo 07.

2. Mohamed Riyaz Mohamed Hamza
No.11, Ruhunukala Mawatha,
Colombo 08.

And Presently

Puisne Judge – High Court of Fiji.
Registrar of the High Court of Fiji,
Fiji.

By his Attorney –

Mohamed Uvais Mohamed Hamza
No.26/9, Sir Marcus Fernando Mawatha,
Colombo 07.

3. Mohamed Iqbal Faiz Abdul Caffoor
No.31, W.A.D. Ramanayake Mawatha,
Colombo 02.

4. Farzad Hussain Caffoor
No.05, Flower Road,
Colombo 07.

5. Azmeth Hussain Caffoor
No.114B, Horton Place,
Colombo 07.

6. Mohamed Thalib Hassan Caffoor
No.81, Horton Place,
Colombo 07.

By his Attorney –

Fathima Inneth Sherin Caffoor
No.10/16A, Lake Drive, Lake Drive
Enclave, Colombo 08.

7. Mohamed uvais Mohamed Hamza
No.26/9, Sir Marcus Fernando
Mawatha,
Colombo 07.

8. Sithy Shihara Caffoor
No.114B, Horton Place,
Colombo 07.
9. Mohamed Hejazi Thahir
No.117, Hampden Lane, Wellawatte,
Colombo 06.
10. Mohamed Hussain Sulaiman
No. 61, Ananda Coomeraswamy
Mawatha,
Colombo 03.
11. Mohamed Abdul Nasser Hammad
No.05, Flower Road,
Colombo 07.
12. Jamila Hanim Abdul Carder
No.85, Barnes Place,
Colombo 07.

Trustees of Trust established by the Deed/indenture of Trust bearing No. 2125 dated 1935.11.21 attested by John Wilson of Colombo, Notary Public.

DEFENDANT – PETITIONERS

- Vs -

1. Mohamed Ibrahim Mohamed Mafaz
No.40/10, King Lane,
Pannawa,
Kobeigane.

2. Mohamed Jabir Mohamed maznavi
No.51/1, Beira Road,
Colombo 12.

3. Pakeerdeen Shahib
No.427/D, kanamoolai,
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4. Abdul Raseedu Muhammadu Manas
No.22, Western Solden Road,
Puttalam.

5. Mohamed Mohammed Ashraf
No.32, Temple Avenue,
Maradana,
Colombo 10.

PLAINTIFF – RESPONDENTS

6. Mohamed Alavi Nawaz Gafoor
No.57, Green Path,
Colombo 07.

7. Mohamed Zubair Nehru Caffoor
No.10/16A, Lake Drive,
Lake Drive Enclave,
Colombo 08.

8. Ahmed Jazeem Mohamed Arif
No.171/7A, Bauddhaloka Mawatha,
Colombo 04.

DEFENDANT – RESPONDENTS

Before: C.P. Kirtisinghe - J.
Sampath K.B. Wijeratne - J.

Counsel: Suren Gnanaraj with Shamalle De Silva instructed by Sanath Wijewardane for the Petitioners.
Hijaz Hisbullah with M.A. Zard for the 2nd, 3rd and 4th Plaintiffs- Respondents.

Inquiry on: 16.02.2023

Decided On: 16.05.2023

C. P. Kirtisinghe – J

When this matter was taken up for supporting the Learned Counsel for the 2nd to 4th Plaintiffs-Respondents took up the following preliminary objections to the maintainability of this application.

1. Third parties have been added to the caption. The addition of 8th-12th Petitioners as parties to the petition is contrary to the provisions of section 754 (2) of the Civil Procedure Code as they were not parties before the Wakfs Tribunal.
2. The Petitioners have not complied with Rule 3 (1) read with Rule 3 (15) of the Court of Appeal Appellate Procedure Rules of 1990 and the Petitioners have failed to tender necessary documents to prove the appointments of 8th-12th Petitioners as trustees of the subject trust.
3. Some of the averments in the petition contain facts which could not be pleaded in the petition in terms of section 758 of the Civil Procedure Code.
4. The Petitioners have suppressed material facts and/or misrepresented material facts.

Both parties were permitted to file written submissions regarding those preliminary objections and I have perused those written submissions.

I will take up the 4th Objection first. The paragraph 26 of the petition states as follows;

“Without prejudice to the above preliminary objections and the contention of bias, the parties framed admissions and issues on 19.03.2022 and issues No. 26 and 27 were raised by the Petitioners as preliminary issues of law.....”

The Learned Counsel for the Plaintiffs-Respondents submitted that the assertion that the Petitioners raised issues and recorded admissions without prejudice to their objection on bias is futile. The Wakfs Tribunal had rejected the allegation of bias and that order was not canvassed before this court. The Petitioners cannot raise that objection again. The Learned Counsel submitted that nowhere in the proceedings before the Wakfs Tribunal was it recorded that the Petitioners had proceeded to record that the admissions and issues without prejudice to the above preliminary objections and contention of bias. That is not a suppression of a material fact or a misrepresentation but a legal position taken up by the Petitioners in their petition. The allege misrepresentation or the suppression should relate to a material fact. A mere misrepresentation or a suppression is not sufficient. A material fact is something which is material for the Judge to decide a case. Here, there is no such material fact and that objection must fail.

I will proceed to consider the 3rd objection next. It was the submission of the Learned Counsel for the Plaintiffs-Respondents that a party is required to set out a plain and concise statement of the grounds of objections under section 758(1)(d) of the Civil Procedure Code and therefore, there is no necessity for background information. Therefore, containing matters that are not relevant to the order and which are factual and evidential are violative of section 758(1)(d) of the Civil Procedure Code.

Section 758(1) of the Civil Procedure Code reads as follows;

758(1) The Petition of appeal shall be distinctly written upon good and suitable paper, and shall contain the following particulars:-

- (a) the name of the court in which the case is pending;
- (b) the names of the parties to the action;
- (c) the names of the appellant and of the respondent;
- (d) the address to the Court of Appeal;

(e) a plain and concise statement of the grounds of objection to the judgement, decree, or order appealed against - such statement to be set forth in duly numbered paragraphs;

(f) a demand of the form of relief claimed.

Section 759(1) reads as follows;

“If the petition of appeal is not drawn up in the manner in the manner in the last preceding section prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended, within a time to be fixed by the court; or be amended then and there. When the court rejects under this section any petition of appeal, it shall record the reasons of such rejection. And when any petition of appeal is amended under this section, the Judge, or such officer as he shall appoint in that behalf, shall attest the amendment by his signature.”

Therefore, the court can reject a petition of appeal or return it for amendment under section 759(1) of the Civil Procedure Code only in a situation where the appellant has failed to comply with the provisions of section 758(1). The Plaintiffs-Respondents have not taken up the position that the Petitioners have failed to comply with the provisions of section 758(1). Therefore, the Plaintiffs-Respondents cannot ask for a rejection of the petition under section 759(1). Section 758(1) does not restrict a party from averring matters which are in addition to those matters stipulated in section 758(1) of the Civil Procedure Code, in the petition or appeal and that is not a ground to reject a petition or appeal. A sufficient statement of the facts of the case is necessary to render the grounds of objection intelligible.

In the case of **Dingiri Appuhamy Vs Siyathu (1903) 7 NLR 304** Wend J. stated as follows;

“Section 758 of the Civil Procedure Code directs that a “petition shall contain a plain and concise statement of the grounds of objection to the decree appealed against.” That necessarily implies that there shall also be a sufficient statement of the facts of the case and of the judgment to render the grounds of objections intelligible. The present petition plunges in medias res, and states the grounds of objection to the decree without even mentioning what the subject – matter of the action was.”

The learned Counsel for the Plaintiffs-Respondents has drawn our attention to the averments contained in paragraph 5 of the petition and states that the registration with the Register General and payment of income tax has no relevance whatsoever. Averments in paragraph 5 states that the trust which is the subject matter of this case is registered in the Register General's department as a private express trust and it is subject to income tax. That is a relevant fact to show that it is an express trust. The learned Counsel for the Plaintiffs-Respondents has stated that the Respondents have no opportunity to file objections to say their side of the story. Although there is no requirement to file a statement of objections in a leave to appeal application the Respondents can do so with permission of court if they desire to do so. Therefore, there is no merit in the 3rd preliminary objection.

The Plaintiffs-Respondents have taken up the position that the Petitioners have failed to comply with Rule 3(1)(a) read with Rule 3(15) of the Court of Appeal (Appellate Procedure) Rules of 1990 because of their failure to annex documentary proof of the appointments of the 8th to 12th Petitioners as trustees of the trust which is the subject matter in this case.

Rule 3(1)(a) reads as follows,

“Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Article 140 and 141 of the Constitution shall be by way of Petition, together with and affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule, the Court may ex mero motu or at the instance of any party dismiss such application.”

Rule 3(15) reads as follows,

“These rules shall apply, mutatis mutandis, to applications made to the Court of Appeal under any provision of Law other than Article 138, 140 and 141 of the Constitution, subject to any direction as may be given by the Court in any particular case.”

In the case of **Caderamanpulle and others Vs. Caderamanpulle and others 2005 (1) SLR 397** a preliminary objection was taken to the effect that the failure of the Petitioner to file certified copies of the documents which amounts to a noncompliance of Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules of 1990 is fatal in a Leave to appeal application and the Leave to appeal application should be rejected on that ground. This court held that the Rule 3 of the Court of Appeal (Appellate Procedure) Rules of 1990. The court held that the court has no power to dismiss a Leave to appeal application in limine on the Petitioner's failure to produce certified copies of documents.

Amaratunga J. held as follows;

“But as the matter now stands, there is no requirement under sections 757 and 758 of the Civil Procedure Code to annex any documents to an application for leave to appeal except the affidavit of the Petitioner.....As the rules presently stand the Court has no power to dismiss a leave to appeal application on the basis that necessary documents have not been filed.”

This is not an application for substitution and therefore the proof of the appointments of 8th to 12th Petitioners is unnecessary and that preliminary objections must necessarily fail.

Now I will deal with the 1st preliminary objection. The Plaintiffs-Respondents have taken up the position that the 8th to 12th Defendants-Petitioners were not parties in the original plaint. They were never added as parties to this action and they did not seek to be added as parties. Therefore, they are not parties to this action and cannot be “Defendants” who can prefer this leave to appeal application as Defendants-Petitioners.

In this leave to appeal application 8th to 12th Petitioners are referred to as Defendant-Petitioners but according to the caption of the case before the Wakfs Tribunal which is contained in this leave to appeal application the 8th to 12th Petitioners are not included as Defendants. Therefore, it is clear that they were not parties in the trial before the Wakfs Tribunal and they were not added as Defendants at the trial. That is not a disputed fact. The learned Counsel for the Petitioners has stated in his written submission that the 8th to 12th Petitioners were not named before the Wakfs Tribunal as they assumed office as trustees after the plaint was filed before the Wakfs Tribunal. The learned Counsel has

drawn our attention to the words “seeks to be a party” which contain in section 754(2) of the Civil Procedure Code which reads as follows,

“Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding, or matter to which he is or **seeks to be a party**, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.”

There is no dispute that the 8th to 12th Petitioners were not parties to the trail before the Wakfs Tribunal. The 8th to 12th Petitioners have not made an application to this court for substitution. There is no proof that they had made an application to the Wakfs Tribunal for addition or substitution. They do not say so. Therefore, they had not sought to be a party to the action in the Wakfs Tribunal and they cannot be treated as persons who seek to be parties within the meaning of section 754(2) of the Civil Procedure Code. That section envisages a person who had made an application in the original court to be a party to an action and whose application was refused by court. Therefore, the 8th to 12th Petitioners cannot make this application to this court as Petitioners.

The learned Counsel for the Petitioners has cited several authorities to show that all the trustees are necessary parties to an action filed on behalf of the trust. That is settled law. Section 473 of the Civil Procedure Code provides that when there are several trustees, executors or administrators they shall all be made parties to an action by or against one or more of them. In the case of **Sinnathamby Vs Kandaiah 56 NLR 535** it was held that where there are several trustees, they shall all be made parties to an action instituted by one or more of them. It is the case of the 8th to 12th Petitioners that they were not named before the Wakfs Tribunal because they assumed office as trustees after the plaint was filed. If those Petitioners are necessary parties to this application the Petitioners must follow the correct procedure to make them parties to this application. They will not become parties automatically. Until that is done 8th to 12th Petitioners cannot be parties to this application as Petitioners and they can neither be Defendants to the action before the Wakfs Tribunal. For the aforesaid reasons the caption of this application becomes defective.

In the case of **Ibrahim Vs Beebee 19 NLR 289** it was held that it is necessary for the proper constitution of an appeal that all parties to an action who may be

prejudicially affected by the result of the appeal should be made parties and unless they are the petition of appeal should be rejected. That was case of non-joinder of necessary parties in an appeal. In that case the caption became defective due to the non-joinder. In this case the caption has become defective due to the misjoinder of 8th to 12th Petitioners who are not parties in the court below. Therefore, the rationale in Ibrahim Vs Beebee will apply to this case as well. This judgment was followed in **Suwarishamy Vs Thelenis 54 NLR 282** where it was held that where in an appeal, a necessary party has not been made a Respondent, the appeal will be dismissed unless the defect is not one of an obvious character which could not reasonably have been foreseen and avoided. These two cases were decided under the Old Civil Procedure Code where the section 759(2) of the present Civil Procedure Code was not there. Section 759(2) of the present Code reads as follows;

“In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.”

In the case of **Nanayakkara Vs Warnakulasuriya 1993 (2) SLR 289** Kulatunga J. (with G.P.S. De Silva CJ. and Wijetunga J. agreeing) held that the power of the court to grant relief under section 759(2) of the Code is wide and discretionary and is subject to such terms as the court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.

The principles applicable to the exercise of this power have been clearly laid down by Bandaranayake J. Fernando J. and Kulathunge J. in three separate judgements in the case of **Martin Vs Suduhamy 1991 (2) SLR 279**.

When one compares the Old Civil Procedure Code with the present Code on grounds of rejection of the petition of appeal a more liberal view has been incorporated by section 759(2) of the present Civil Procedure Code. The law as it stood earlier was very strict in its application and had made mandatory provisions with regard to provisions relating to a notice of appeal, petition of appeal and security of costs of appeal. The legislature has contemplated to relax the rules since mistakes, omissions and defects occur very frequently by the

legal practitioners and one has to be mindful of it which may occur due to human error.

For the aforesaid reasons I am of the view that the defect in the caption of the petition in this case is a curable defect and permit the Petitioners to file an amended petition. This cannot materially prejudice the Plaintiffs-Respondents. Therefore, I overrule the 1st preliminary objection. The amended petition has to be filed on or before 1 p.m. on 16th June 2023 in the registry of the Court of Appeal. Failure to comply with the above direction on or before the due date and time will result in the automatic rejection and dismissal of this leave to appeal application.

All preliminary objections overruled. Parties will bare their own costs of this inquiry.

Judge of Court of Appeal

Sampath K.B. Wijeratne - J.

I Agree

Judge of Court of Appeal